No. 12,158

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SUCKOW BORAX MINES CONSOLIDATED, INC., a corporation; MOJAVE BORAX COMPANY, LTD., a corporation; PAUL O. TOBELER, Executor of the Last Will and Testament of John K. Suckow, deceased, and RUTH E. SUCKOW,

Appellants,

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY, AMERICAN POTASH & CHEMICAL CORPORATION, STAUFFER CHEMICAL COMPANY, WEST END CHEMICAL COMPANY, WESTERN BORAX COMPANY, LTD., GOLDFIELDS AMERICAN DEVELOPMENT COMPANY, PACIFIC ALKALI COMPANY, F. LESSER, JAMES M. GERSTLEY, FRANK M. JENIFER, P. C. BAKER, ALLEN W. ASHBURN, WALTER A. MOSES, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Executor of the Last Will and Testament of Clarence McAnisse Rasor, deceased, and BEN H. BROWN, as Special Administrator of the Estate of Victor C. Emden, deceased, *et al.*,

Appellees.

BRIEF ON BEHALF OF APPELLEE AMERICAN POTASH & CHEMICAL CORPORATION

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Suckow Borax Mines Consolidated, Inc., *et al.*,
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vs.

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Appellees.

BRIEF ON BEHALF OF APPELLEE AMERICAN POTASH & CHEMICAL CORPORATION

Statement

This is an appeal from a judgment dismissing the complaint, entered in the District Court of the United States for the Northern District of California, Southern Division, on November 22, 1948 (R. 621).* The action was brought under Section 4 of the Clayton Act (U. S. C. Title 15 Section 15) for damages alleged to have been sustained by appellants as a result of a conspiracy by appellees in violation of the antitrust laws of the United States. The complaint alleged a conspiracy and overt acts of the defendants, or some of them, in two periods, one prior to 1934, and the other between 1934 and 1942, which caused them damage. This action was not brought until September 11, 1947 (R. 80).

*R—refers to printed Transcript of Record; Br.—refers to Appellants' brief.

Appellees moved to dismiss for failure to state a claim upon which relief could be granted, to dismiss because the action was barred by the three-year California statute of limitations, Section 338(1) of the Code of Civil Procedure, and for a summary judgment supported by affidavits (R. 106-466).

Argument on the motions was heard on April 3, 7 and 13, 1948. On April 7, 1948, appellants filed a First Amendment to the complaint, and on April 23, filed a Second Amendment (R. 82). The District Court determined to withhold a decision until the determination by the Court of *Burnham Chemical Co.* v. *Borax Consolidated, Ltd. et al.* That decision was rendered on October 27, 1948, 170 F. (2d) 569, certiorari denied March 7, 1949 (336 U. S. 924), petition for rehearing denied April 19, 1949 (No. 513 October Term, 1948). On November 2, 1948 the court below handed down an opinion now reported in 81 F. Supp. 301, and granted appellees' motions to dismiss the complaint (R. 610-621).

Summary of Argument

The principal issues presented by this appeal have already been considered by this Court and disposed of adversely to appellants' contentions in the *Burnham* case. The same counsel who represented Burnham represent appellants and a comparison of appellants' brief with the opinion of this Court in the *Burnham* case shows the same issues and argument are presented with no attempt to distinguish the cases.

Appellants' brief has 87 pages, the first 44 consisting of a description of the nature of the appeal, and over 30 pages

of direct quotations from the complaint. Of the 43 pages of argument, about 20 pages (56-60, 63-79) present the very same arguments which were presented to this Court in the *Burnham* case and which were disposed of adversely to appellants' contentions.

Although the District Court relied upon the *Burnham* decision as dispositive of most of the issues presented by appellants and repeated here, appellants completely ignore this Court's decision. The argument for the application of the equitable rule of *Holmberg* v. *Armbrecht,* 327 U. S. 392 (1946) which counsel make in this brief, pages 74-79, was made by the same counsel in the petition for a writ of certiorari in the *Burnham* case, and was rejected by the Supreme Court. This appellee will not re-argue the principles of law decided in the *Burnham* case, but will limit its brief to a discussion of those principles as they are applicable to the issues herein presented.

The issues left for determination by this Court are:

1. Was the motion to dismiss properly granted on the ground that

(a) on the face of the complaint it appeared that the causes of action were barred by the applicable three-year California statute of limitations, the last cause of action being alleged to have occurred in December 1942, and the complaint not having been filed until September 11, 1947; or

(b) that the complaint failed to state a claim upon which relief may be granted (1) by failing to allege affirmatively any injuries suffered by reason of the appellees' acts, and (2) by affirmatively alleging releases.

2. Was the motion for summary judgment properly granted upon the ground that from the affidavits and pleadings it appeared

(a) that there was no fraudulent concealment of the alleged cause of action by defendants which would have tolled the statute of limitations;

(b) that appellants gave appellees releases for which they received adequate consideration, or

(c) that in every transaction with the appellees, appellants received consideration or an adjudication of their rights by a court having jurisdiction.

If the District Court ruled correctly on any one of these grounds, the judgment should be affirmed.

I.

THE DISTRICT COURT PROPERLY GRANTED THE MOTION TO DISMISS ON THE GROUND THAT THE ACTION WAS BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS.

Appellants contend the court erred on two counts in granting the motion to dismiss the complaint as barred by the statute of limitations: first, as a matter of procedure, that the issue could not properly be raised on a motion to dismiss; second, as a matter of fact, that the allegations of the complaint were sufficient to establish it was filed timely.

Appellants contend that the statute of limitations may not be raised on a motion to dismiss (Br. 79-82). Appellees raised the issue of the bar of the statute of limitations

both by motions to dismiss and motions for summary judgment (R. 441-466, 617). Affidavits were submitted by appellees in support of the motions (R. 166-440) and by appellants in opposition thereto (R. 466-610).

Rule 12(b)(6) of the Rules of Civil Procedure provides that the defense of "failure to state a claim upon which relief can be granted" may be made by motion. It further provides that if on such a motion the court receives matters outside the pleadings, the motion shall be treated as one for summary judgment.

(a) The Bar of the Statute of Limitations May Be Properly Raised by a Motion to Dismiss.

The defense of the statute of limitations may be made by motion under Rule 12(b)(6) for failure to state a claim where the complaint shows upon its face when the alleged cause of action arose.

The two cases cited by appellants in support of the proposition that under the Federal Rules of Civil Procedure the defense of the statute of limitations may not be raised by motion to dismiss the complaint are *Dirk Ter Haar* v. *Seaboard,* 1 F. R. D. 598 (S. D. Cal. N. D. 1940) and *Carlisle* v. *Kelly,* 72 F. Supp. 326 (E. D. Pa. 1947) (Br. 79-80). While these cases apparently support the proposition, both are district court cases and represent a definitely minority view, the overwhelming weight of authority being contrary. Thus, the Sixth, Eighth and Tenth Circuit Courts of Appeal, the only Circuit Courts to rule on the question, have held that the defense of statute of limitations may be raised by motion to dismiss. See

Berry v. *Chrysler Corp.,* 150 F. (2d) 1002 (C. A. 6, 1945);

A. G. Reeves Steel Construction Co. v. *Weiss,* 119 F. (2d) 472 (C. A. 6, 1941) cert. den. 314 U. S. 677;

Kithcart v. *Metropolitan Life Insurance Company,* 150 F. (2d) 997 (C. A. 8, 1945);

Gossard v. *Gossard,* 149 F. (2d) 111 (C. A. 10, 1945).

In *Abram* v. *San Joaquin Cotton Oil Co.,* 46 F. Supp. 969, the District Court of the United States for the Southern District of California, Central Division, said at page 974:

> "The plaintiff questions the propriety of the defendant's motion to dismiss, to raise the statute of limitations. * * * Rule 9(f) provides: 'For the purpose of testing the sufficiency of a pleading averments of time and place are material and shall be considered like all other averments of material matter.' There is a comment on Rule 9(f) in Vol. 1 Moore's Federal Practice, 595 at 597, viz.: 'The rule at common law and under the codes has been subject to certain exceptions, that general averments of time and place are immaterial. Subdivision (f) changes that rule in only one respect, viz.: for the purpose of testing the sufficiency of a pleading, i.e., upon a motion to dismiss * * * time and place are material. * * * Since time is material under subdivision (f) for purposes of testing sufficiency of a pleading, a motion to dismiss because the statute of limitations has run may be utilized * * * whenever the time alleged in the statement of claim shows that the cause of action, whether ex contractu or ex delicto has not been brought within the statutory period.' "

Other cases supporting this view are

Wilson v. *Shores Mueller Co.,* 40 F. Supp. 729 (N. D. Iowa 1941);
Wright v. *Banker's Service Corp.,* 39 F. Supp. 980 (S. D. Cal. 1941);
United States v. *Carling,* 39 F. Supp. 864 (E. D. Wis. 1941);
Hartford Empire Co. v. *Glenshaw Glass Co.,* 47 F. Supp. 711 (W. D. Pa. 1942).

Here the last alleged cause of action was alleged to have occurred in December 1942 (Complaint Para. 88(e) R. 73-75), and the complaint was not filed until September 11, 1947 (R. 80). The applicable California statute of limitations, Section 338, subdivision 1 of the California Code of Civil Procedure, being 3 years, the issue was apparent on the face of the complaint.

(b) The Complaint Showed on Its Face That the Action Was Barred by the Statute of Limitations.

The specific allegations of the complaint showed clearly that the cause of action was barred by the statute of limitations, and the allegations tending to show it was either tolled or suspended were totally insufficient.

(1) *The action was barred by the 3-year statute of limitations Section 338(1) of the California Code of Civil Procedure*

The activities claimed to have caused the alleged damage fall into two periods, the first culminating in August 1934, at which time appellants went out of the borax business entirely; and the second culminating in December 1942.

Although the complaint was not filed until September 11, 1947, more than three years after the last alleged cause of action, it fails to make any allegation that the statute of limitations was tolled. Failing such an allegation, the action is barred under Section 338(1) of the Code of Civil Procedure.

Burnham v. *Borax, supra*;
Foster & Kleiser v. *Special Site Sign Co.*, 85 F. (2d) 742 (C. A. 9, 1936), cert. den. 299 U. S. 613.

See also, *Momand* v. *Universal Film Exchange,* 172 F. (2d) 37, 49 (C. A. 1, 1949).

(2) *There were no allegations of fraudulent concealment in the complaint sufficient to toll the statute of limitations.*

On the face of the complaint the action would be barred, unless the allegations of "fraudulent concealment" of the alleged cause of action were sufficient to toll the statute. If the latter allegations were insufficient, the motion to dismiss was the proper procedure. If they were sufficient for purposes of pleading, the issue could then be presented under Rule 56, if it appeared from the affidavits that no material issue of fact was presented. *Burnham* v. *Borax, supra.*

The complaint contains no allegation that the acts of damage charged were concealed, fraudulently or otherwise, from appellants. The complaint does, however, allege in general terms that appellees "fraudulently concealed" the existence of the conspiracy charged (See paragraphs 89 and 91, R. 75-77). It appears that appellants are contend-

ing that appellees' failure to disclose to them the existence of the conspiracy constitutes, under California law, a "fraudulent concealment" of their cause of action. There is no merit in such a contention for the reason that in any event appellees owed no duty to appellants to disclose to them the existence of the alleged conspiracy.

The complaint alleges no facts which make the theory of fraudulent concealment applicable to these causes of action. The only allegations upon which appellants rely are the *conclusions* (1) that appellees "fraudulently concealed" from appellants their cause of action, and (2) that appellants did not "discover" this fact until the Government instituted suits.

In order to prevent the running of the statute of limitations appellants must *plead* and prove facts establishing fraudulent concealment; the fraudulent concealment must be of facts upon which the existence of the cause of action depends; *facts* must be alleged from which the court may conclude the date of "discovery"; and appellants must allege *facts* which establish that they could not have made the "discovery" earlier by the exercise of ordinary diligence.*

**Vertex Investment Co.* v. *Schwabacher,* 57 C. A. 2d 406 (hearing by Supreme Court denied); *Lady Washington Consolidated Co.* v. *Wood,* 113 Cal. 482; *Wood* v. *Carpenter,* 101 U. S. 135 at 140 (1879); *Collins* v. *The Texas Company,* 123 Cal. App. 60; *Consolidated R. & P. Co.* v. *Scarborough,* 216 Cal. 698; *Daily Telegraph Co.* v. *Long Beach Press Publishing Co.,* 133 Cal. App. 140; *Turman* v. *Holmes,* 29 C. A. 2d 198; *Haley* v. *Santa Fe Land Improvement Company,* 5 C. A. 2d 415 (judgment reversed with instructions to sustain demurrer); *Moore* v. *Boyd,* 74 Cal. 167; *Johnson* v. *Ehrgott,* 1 Cal. 2d 138; *Myers* v. *Metropolitan Trust Company,* 22 C. A. 2d 284; *Shonts* v. *Hirliman,* 28 F. Supp. 478 (S. D. Cal. 1939)

In the *Foster & Kleiser* case, *supra,* the Court stated that nondiscovery, within the meaning of the rule is "absence of facts that would put a party upon notice of the cause of action. Mere ignorance of the injury complained of, or of the facts constituting such injury will not prevent the running of the statute."

The only allegation in the complaint upon which appellants predicate their claim of "discovery" of their causes of action is the commencement of actions by the Government against these appellees on September 14, 1944. Consequently, the only *fact* which appellants have to rely on is that the Government *accused* appellees of violating the antitrust laws. Appellants allege in paragraph 83e that *in 1934* appellees "claimed they were not in violation of the antitrust laws of the United States" (R. 60). Accordingly, appellants had equally as much cause to investigate the suspicion created in 1934 as they did the suspicion created in 1944. Upon the basis of the allegations in the complaint, appellants should have discovered the cause of action in 1934.

The District Court properly observed

> "In none of the cited cases (re fraudulent concealment) is there any rule to the effect that a mere denial of a violation of law constitutes a fraud upon the injured party so that the statute is tolled by reason of the exception to the general rule" (R. 619).

This is in accord with the *Burnham* case where the very same issue was presented.

Each of the acts of damage alleged in the complaint shows that it was known to appellants at the time the act was done. It alleges various acts done jointly by Pacific

Coast Borax Company and Borax Consolidated, Ltd. If appellants were damaged by various acts of appellees jointly from 1934 to 1942, they had just as much cause for suspecting a conspiracy before the Government suits as they did afterwards. Appellants plead no justification for failure to investigate prior to the Government's suits, and do not allege they made any investigation afterwards.

It should be particularly noted that nowhere in the complaint is it expressly alleged that any of the acts charged were done by American Potash & Chemical Corporation.

II.

THE DISTRICT COURT DID NOT ERR IN DISMISSING THE COMPLAINT UPON THE MOTION FOR SUMMARY JUDGMENT.

The District Court found that appellees' contentions were supported both by the allegations on the face of the complaint, and by the uncontroverted facts as they appeared in the affidavits and exhibits, attached thereto. Under the amendment to Rule 12(b)(6) it is immaterial whether the affidavits be treated as accompanying the motion to dismiss or the motion for summary judgment. See *Advisory Committee Report of Proposed Amendments to Rules of Civil Procedure,* (June 1946) 11-15.

(a) The District Court Properly Ruled That the Affidavits and Pleadings Established There Were No Genuine Issues of Fact to Be Tried.

Appellants rely strongly upon the effect of the alleged "admissions" by appellees of allegations of the complaint arising from the filing of the motions to dismiss and for

summary judgment. They take the position that every allegation of fact or law, no matter how general, conclusionary, or unsupported, stands admitted (Br. 34, 41-43, 45-48, 60, 69, 73). For the purposes of a motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted; *but conclusions of law or unwarranted deductions of fact are not admitted.* See 2 *Moore's Federal Practice* (2nd Ed.) p. 2244 Para. 12.08.

Far from *admitting* the allegations of the complaint, the summary judgment procedure is intended to permit a party *to pierce the allegations of fact* in the pleadings and to obtain relief where the facts set forth in the affidavits show there are no *genuine* issues of fact to be tried.

> *Do Brasil S/A* v. *Stulman-Emrick Lumber Co.,* 147 F. (2d) 399 (C. A. 2, 1945) cert. den. 325 U. S. 861;
>
> *Schreffler* v. *Bowles,* 153 F. (2d) 1, (C. A. 10, 1946) cert. den. 328 U. S. 870.

Appellants' contention that affidavits in support of a motion for summary judgment cannot be used to contradict the allegations of the complaint is erroneous (Br. 3, 48-55). The formal issues made by the pleadings are not controlling, the problem being to ascertain from the proof whether a substantial issue of fact remains. If this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss.

> *Lindsay* v. *Leavy,* 149 F. (2d) 899 (C. A. 9, 1945).

Where it appears from the affidavits and pleadings that there are no genuine issues of fact, and the issues of law

resolve themselves in favor of a defendant, a summary judgment based upon the statute of limitations may be entered on the defendant's motion.

Wilcox Steel Co. v. *George A. Fuller Co.,* 122 F. (2d) 292 (C. A. 2, 1941), aff'd 316 U. S. 143;
Baker v. *Sisk,* 1 F. R. D. 232 (D. Okla., 1938);
Means v. *McFadden Publications, Inc.,* 25 F. Supp. 993 (S. D. N. Y. 1939);
McGrath v. *Helena Rubinstein,* 29 F. Supp. 822 (S. D. N. Y. 1939);
Downey v. *Palmer,* 31 F. Supp. 344 (S. D. N. Y. 1939);
Backus v. *Look, Inc.,* 39 F. Supp. 662 (S. D. N. Y. 1941).

Mere denials by the plaintiff are insufficient to defeat the motion.

Piantadosi v. *Loew's, Inc.,* 137 F. (2d) 534 (C. A. 9, 1943).

Summary judgment should be granted if the court is already convinced from the record that if the action were permitted to go to trial a verdict would necessarily be instructed for the moving party.

Burnham v. *Borax, supra;*
Mutual Life Ins. Co. of N. Y. v. *Bullard,* 1 F. R. D. 180 (S. D. Fla., 1940).

(b) The District Court Properly Ruled That the Facts Established There Was No Fraudulent Concealment.

This complaint contains the very same kind of allegations made in the *Burnham* complaint, that there was a "General Conspiracy" of 1929 by which appellees injured appellants, and that this particular conspiracy was fraudulently concealed from them (R. 48-50, 67-69). This Court held in the *Burnham* case that the plaintiff could not rely upon the alleged conspiracy itself as giving rise to a cause of action, but must look to the acts done by the defendants pursuant to the conspiracy, which caused it damage.

The exhibits filed in support of the motions support the conclusion of the District Court that the alleged date of discovery in 1944 was totally unsupported, and that many years prior thereto "the plaintiffs knew, or had reason to believe, that the acts of the defendants which caused the claimed damages were a violation of the Anti-trust Laws" (R. 619).

In the course of lawsuits referred to in the complaint and which appellants alleged were settled appellants made the very same allegations of violations of the antitrust laws against some of these appellees as are made in the present complaint.

In paragraph 80 of the complaint, appellants allege that on or about September 21, 1927, Borax Consolidated, Ltd. commenced an action (No. 20694) against John K. Suckow in the Superior Court, Kern County (R. 50-51). In the District Court appellees filed an affidavit made by John K. Suckow on January 13, 1930 in that Kern County suit, in which he accused the appellees, Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company, of being a "Borax trust" (R. 85-86).

In paragraphs 13-15, inclusive (R. 93-96), Suckow accused them of an agreement to eliminate competition.

In paragraph 83(b) and (g) of the complaint appellants allege that on March 29, 1930 Borax Consolidated, Ltd. commenced an action numbered C-107-H in the United States District Court in and for the Southern District of California against Suckow Borax Mining Consolidated, Ltd., and that a judgment was entered against Suckow on February 8, 1934 (R. 53, 61). In the District Court appellees submitted as an exhibit the "Answer to Bill in Equity as Amended" which was filed by Suckow in that action on December 8, 1932 (R. 156).

In paragraph two of that answer Suckow made as definite a charge of violation of the anti-trust laws in 1932 as is contained in those paragraphs of the present complaint, which were copied from the Government's complaint filed in 1944. Suckow's 1932 charge was as follows (R. 157-158):

> "2. It is and was at all times herein mentioned a part of the fixed design and general policy of said Borax Trust to dominate and control both the extent and amount of production of borate products, and as well the price or prices at which the same should or might be sold in the markets of the world, thereby to secure a monopoly with respect to the production and marketing thereof, wholly for its own gain and to the detriment of its competitors and of the general public. Pursuant to said fixed design and general policy said Borax Trust has at all times herein mentioned established, settled and fixed, and does now by agreement and understanding between its members aforesaid establish, settle and fix, the prices of said borate products from time

> to time in such manner as to preclude and to prevent free and unrestricted competition in the production and marketing of the products aforesaid. Said members of said Trust have likewise at all times herein mentioned *combined, confederated, conspired and agreed, and do now combine, confederate, conspire and agree, among themlselves, each with the other and in restraint of free trade and competition,* to pool, combine and unite their several interests and facilities in connection with the production, marketing and sale of said borate products in such a manner as to affect, control and dominate the price or prices thereof to the consumer and to the manufacturing world in general, and thereby to stifle competition with regard to such production, marketing and sale thereof." (italics supplied)

During the course of a hearing in this matter on December 26, 1932, attorneys for Suckow made the following charges in open court (R. 101-102):

> "* * * this whole thing is a part of a *plan to throttle competition and create a monopoly* in the United States and subject the people of the United States to the evils of monopoly in the dealings in borax. In other words, that this is a part of the plan to bring about an unlawful and illegal result; and that this court is being used to aid in accomplishing that unlawful purpose * * * If it is true, it constitutes an absolutely illegal proceeding *in direct violation, not only of the policy of the law, but the statutes of the United States.*" (italics supplied)

Many other similar allegations are contained in the record and amply sustain the conclusion of the District Court. The evidence that appellants "knew, or had good cause and reason to believe" that their business was dam-

aged by acts of appellees, which violated the antitrust laws of the United States, is much stronger here than in the *Burnham* and *Foster & Kleiser* cases.

Although appellants filed reply affidavits to those submitted by appellees, their brief does not contain a single reference to or quotation from them in contradiction of the statements made above (Br. 36). They ask this Court to blind itself to the *real facts* by arguing (Br. 69):

> "* * * Any references during the intervening years and made by appellants to appellees as violators of the antitrust law are of no moment as against the allegations of the complaint to the effect that appellants had no knowledge of their cause of action (conspiracy of '29) until the time of the institution of the Government actions."

Since appellants relied entirely upon the unsupported conclusionary allegations of the complaint to contradict *their own prior specific statements* in judicial proceedings and elsewhere, the District Court properly found there was no *genuine issue* of fact to be determined.

III.

THE MORATORIUM ACT OF OCTOBER 10, 1942 IS NOT APPLICABLE TO SUITS BY PRIVATE PARTIES.

Appellants refer to two statutes which they contend suspended the statute of limitations and extended the 3 year period. U. S. C. Title 15, Section 16 suspends the statute of limitations on suits by private persons under the antitrust laws during the pendency of actions by the Government against the same defendants. The complaint does

allege that the Government commenced actions against some of the defendants on September 14, 1944, alleging violations of the antitrust laws, but does not allege how long they were pending. The records of the District Court show that these actions were terminated in 1945 (R. 616). This suspension does not aid appellants, since the last cause of action was alleged to have occurred in December, 1942.

The other suspension statute was the Act of October 10, 1942, a wartime act suspending the statute of limitations in suits by the United States. If it were applicable, claims for relief which accrued prior to December 21, 1940 would still be barred. Since the principal allegations of alleged damage occurred not later than 1934, claims based thereon would be barred in any event, and as to the 1942 transaction, the District Court held no allegations of injuries had been made (R. 619).

Burnham v. *Borax, supra;*
Foster & Kleiser Co. v. *Special Site Sign Co., supra;*
Momand v. *Universal Film Exchange, supra.*

The 1942 moratorium statute does not apply to private party suits but is restricted to suits by the government. This fact is clear (1) from comparing the statute with Title 15 U. S. C. Sec. 16, and (2) from looking at the legislative history of the statute.

Section 16 of Title 15 U. S. C. is part of the original statute which conferred on private parties the right to sue for damages. It provides:

> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of the

> antitrust laws, the running of the statute of limitations in respect to each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Thus, when Congress intended to suspend the running of the statute of limitations with respect to private suits, it was able to and did use clear language to accomplish that purpose. That clear language may be compared with the language of the moratorium statute (Act of October 10, 1942, c. 589, 56 Stat. 781 (Public Law 740, 77th Congress)), which reads:

> "That the running of any existing statute of limitations applicable to violations of the anti-trust laws of the United States, now indictable or subject to civil proceedings under any existing statute, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

In *Wheeler* v. *Greene,* 280 U. S. 49 (1929), Mr. Justice Holmes pointed out that when statutes deal with a similar subject, an omission in the latter one of language in the former is not to be attributable to oversight or to anything but design. "When so important a grant of power contained in the prototype is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed."

And the Supreme Court recently made similar comment in reversing an interpretation of the statute as too broad in *United States* v. *Wittek,* No. 473, October Term, 1948, June 14, 1949 (reported 17 U. S. Law Week 4479).

In the second place, the legislative history of the moratorium act of 1942 clearly shows that there was no intention on the part of Congress that the act should suspend the running of statutes of limitations applicable to actions by private persons.* The committee reports on S. 2731,** which became enacted into law as Public Law 740, 77th Congress, indicate that the running of the statute of limitations was to be suspended only with respect to civil or criminal proceedings *brought by the United States.*

Thus the Senate and House committee reports, which are identical, state that—

> "This committee had previously reported favorably the bill (H. R. 6484), to suspend the running of the statute of limitations applicable to frauds against the United States, which bill has been enacted into law, approved by the President and is Public Law No. 706. *This bill (S. 2731) will accomplish the same purpose as to violations of the anti-trust laws, both civil and criminal."* (Italics ours).

Public Law No. 706 referred to in the above quotation suspended the running of the statute of limitations with respect to offenses involving the defrauding of the United

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*The right to resort to such legislative materials needs no exposition. It is shown, for example, by the recent decisions of the Supreme Court in *United States* v. *Wittek, supra,* and of this Court in *Matson Navigation Company* v. *War Damage Corporation,* 172 F. 2d 942, cer. den. June 20, 1949.

**77th Cong. 2nd Sess., S. Rep't. 1592; H. Rep't. 2480.

States, but was inapplicable to violations of the antitrust laws. S. 2731 was designed to supplement Public Law No. 706 by applying to violations of the antitrust laws,* and the statement of the committees that S. 2731 would "accomplish the same purpose as to violations of the antitrust laws, both civil and criminal" as Public Law No. 706 indicates clearly that S. 2731 was designed to apply only to proceedings brought by the United States *because Public Law No. 706 had no application whatever to actions by private persons.*

The committee reports state that the enactment of S. 2731 was urged by the Secretary of War, the Secretary of the Navy, and the Attorney General, and was approved by the President, and also contain explanatory communications from these persons which indicate that the bill was intended to suspend the running of statutes of limitations only as to civil or criminal proceedings brought by the United States.

Thus a letter of March 20, 1942, from the Attorney General, the Secretary of War and the Secretary of the Navy to the President stated that:

> "The undersigned have been considering for some time the problem presented by the fact that some of the pending court investigations, suits and prosecutions under the antitrust statutes *by the Department of Justice,* if continued, will interfere with the production of war materials." (Italics ours).

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*Hearing before a subcommittee of the Committee on the Judiciary, United States Senate, 77th Congress, 2nd Sess., on S. 2431, May 28, 1942, remarks of Attorney General Biddle, at page 12.

The letter went on to suggest a procedure under which the Attorney General, Secretary of War and Secretary of the Navy would examine any investigation, prosecution or suit under the antitrust laws *proposed to be commenced by the Department of Justice* and decide whether it would interfere with war production. If it was decided that such an investigation, prosecution, or suit would interfere with war production, the Attorney General would defer action. The letter then stated—

> "The deferment or adjournment of the investigation, suit, or prosecution will not, however, mean the exoneration of the individual or corporation, or the discontinuance of the proceeding. As soon as it appears that it will no longer interfere with war production, *the Attorney General will proceed.*
>
> "To make sure that no one escapes by the running of the statute of limitations, we shall request Congress to pass an appropriate extension of the statute." (Italics ours.)

The President in a letter of March 20, 1942, notified the Attorney General, the Secretary of War, and the Secretary of the Navy of his approval of the procedure suggested by them and stated

> "I note from your memorandum that proper steps will be taken to avoid the running of the statute of limitations * * *."

The annual report of the Attorney General of the United States for the fiscal year ended June 30, 1943, stated at page 14:

> "An arrangement approved by the President and entered into between the Secretary of War,

> the Secretary of the Navy, and the Attorney General on March 20, 1942, provides for the postponement of pending and future *federal* court investigations, prosecutions or suits under the Antitrust Laws where it is preponderantly clear that the progress of the war effort would be otherwise impeded. Each postponement is made public and the investigation, suit, or prosecution is to be resumed as soon as it appears that it no longer interferes with war production. *In order to protect the rights of the Government to proceed at a later date* where investigations have been postponed, Congress on October 10, 1942, (56 Stat. 781), provided for the suspension of the operation of any statute of limitations applicable to violations of the Antitrust Laws until June 30, 1945, or until such earlier time as the Congress by concurrent resolution or the President may designate. Under this arrangement, the trials of twenty-four Antitrust cases and two investigations have been postponed during the current fiscal year." (Italics ours)

On August 18, 1942, the Secretary of War, the Acting Secretary of the Navy and the Acting Attorney General submitted S. 2731 to the Chairman of the Senate Committee on the Judiciary with a letter explaining the necessity for its passage. This letter stated that "in harmony with the purpose announced" in the letter of March 20, 1942, to the President "we request that the enclosed bill be introduced at as early a date as practicable." The letter then gave the following explanation of the purpose of the bill:

> "In instances where anti-trust investigations, prosecutions or suits are postponed, as contemplated by the above-mentioned letter, it is advisable, and

in some instances, essential that the running of the statute of limitations be suspended during the periods of postponement. Such postponements will be during periods expiring not later than the end of the present war. The proposed bill will accomplish the suspension of the running of the statute of limitations applicable to antitrust cases until June 30, 1945, or the earlier date specified therein.

"The undersigned were prepared to submit a similar bill to the Congress prior to the passage of H. R. 6484, which suspends the running of the statute of limitations applicable to frauds against the United States. In view of the fact that H. R. 6484 was then before the Congress, instead of presenting a bill, we requested the amendment of H. R. 6484, so as to provide for the suspension of the statute of limitations applicable not only to cases of fraud against the United States but also to antitrust matters. H. R. 6484 was not however, so amended. *The proposed bill, enclosed herewith, is identical to H. R. 6484, except that, in lieu of providing for suspension of the statute of limitations with respect to frauds against the Government, the proposed bill provides for suspension of the statute of limitations in connection with antitrust suits*—a subject matter not covered by H. R. 6482." (Italics ours.)

The debate on October 5, 1942 on the floor of the House is also illuminating on the question of the intent of Congress in passing this act.*

"The Clerk called the bill (S. 2731) to suspend until June 30, 1945, the running of the statute of limitations applicable to violations of the anti-trust laws.

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*Congressional Record, 77th Congress, 2nd Session, Vol. 88, Part 6, page 7763.

"The Speaker: Is there any objection to the present consideration of the bill?

"Mr. Rankin of Mississippi: Mr. Speaker, I reserve the right to object. Why should we suspend the law with reference to anti-trust cases at this time?

"Mr. McLaughlin:* This bill would merely permit the suspension or the postponement of prosecution of anti-trust cases. It would not in any sense suspend the substantive law with respect to anti-trust offenses, *but it would give the Department of Justice a greater length of time in which to prosecute these cases.*

"Mr. Rankin of Mississippi: The trouble is that they have been taking too long now.

"Mr. McLaughlin: This bill is in fact an emergency war measure. It is designed to expedite the war effort. It comes to the Judiciary Committee with a request for its enactment by the Secretary of War, the Secretary of the Navy, The Department of Justice, and by Mr. Thurman Arnold, who is charged with the duty and responsibility of prosecuting antitrust cases. *It is designed to assist the Government.* Under the present situation it may be necessary *for the Government* to lay aside its war activities and engage in the prosecution of an anti-trust case at a time when its energies are needed in war efforts. This bill would permit the Government to continue its war activities and postpone, without prejudice, the prosecution of antitrust cases until such time as such prosecution will not interfere with the Government's war activities" (Italics ours).

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*Member of Committee on the Judiciary.

The bill S. 2731 was passed by Congress in the same form as it was submitted to the Senate Committee on the Judiciary by the Secretary of War, Secretary of the Navy, and Attorney General.

It is clear from the extracts from the committee reports set forth above and the debate in the House that Congress never had any intention that the bill should suspend the running of statutes of limitations on actions by private persons. If Congress had intended it to apply to actions by private persons, Congress would have made its intention perfectly clear in the bill. While the Government did cease prosecutions generally, private actions were in no way deterred. Since there was no interference with the right of private persons to commence suits, there was no reason to grant them any additional time.

The report of the Senate Committee on the Judiciary on S. 937* amending Public Law No. 740, 77th Congress, by extending the suspension of the running of the statute from June 30, 1945 to June 30, 1946, indicates that the suspension of the statute was extended for the same reasons that the statute was originally suspended. Thus the report contains a letter dated June 16, 1945, from the Attorney General to the Chairman of the Committee on the Judiciary giving the following explanation for the extension of the suspension—

> "In transmitting a draft of the act above mentioned to the Chairman of the Senate Committee on the Judiciary, the Secretary of War, the Secretary of Navy and I pointed out that a procedure has been established under which antitrust investigations,

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*79th Cong., 1st Sess., S. Rep't. 422.

> prosecutions, or suits would be postponed if it appeared that proceeding therewith would seriously interfere with the war effort. We recommended that the Congress pass an appropriate extension of the statute of limitations applicable to antitrust cases so that postponements under this procedure would not serve to grant immunity to violators of antitrust laws. Inasmuch as the procedure above referred to still is being followed, I feel that it is necessary to continue the suspension of the statute of limitations."

The same report contains a letter dated June 14, 1945, from the Chairman of the Federal Trade Commission to the Chairman of the Senate Committee on the Judiciary.

> "The Commission considers important the enactment of the proposed legislation by reason of the fact that *the Federal Trade Commission and the Department of Justice, upon request of the War and Navy Departments, have suspended action in numerous cases* because it was represented that proceedings against various parties would interfere with the war effort" (Italics ours).

The legislative history of the Act of October 10, 1942 clearly indicates that Congress never intended it to suspend the running of the statute of limitations on causes of action by private persons under the antitrust laws, but only intended it to suspend the running of the statute on civil or criminal proceedings by the United States.

IV.

APART FROM THE BAR OF THE STATUTE OF LIMITATIONS THE DISTRICT COURT PROPERLY HELD THAT THE COMPLAINT DID NOT SET FORTH A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

Apart from the bar of the statute of limitations it appears from the face of the complaint that the District Court properly held:

> "* * * The instant complaint fails to affirmatively allege any injuries suffered by reason of the defendants' alleged violations of the Anti-Trust Laws. In every transaction with the defendants, the plaintiffs have received consideration or an adjudication of their rights by a court having jurisdiction" (R. 620).

The theory of appellants was that the "conspiracy" itself was the basis of their cause of action. Upon this ground alone the District Court could properly have dismissed the complaint. *Burnham* v. *Borax, supra; Momand* v. *Universal, supra.*

Treating the various events set forth in the complaint as the causes of action, it appears that they consisted principally of agreements and litigation between the plaintiffs and some of the defendants, in all of which there was either an adjudication or settlement of all claims for which plaintiffs received adequate consideration and gave releases. Appellants failed to allege any injuries to their business or property which have not been compensated for through adjudication or settlement. The effect of the settlements and releases is more fully discussed in the brief of Borax Consolidated, Ltd.

Conclusion

The complaint alleged two series of acts, one culminating in 1934, the other in 1942. Under the *Burnham* decision, the statute of limitations had run against all claims unless the causes of action were fraudulently concealed. The District Court properly held that on the face of the complaint the allegations of fraudulent concealment were insufficient, and from the exhibits submitted it appeared as a fact there was no fraudulent concealment.

The complaint failed to affirmatively show injuries to appellants' business or property, but on the contrary it appears that in every transaction with appellees appellants have received consideration or an adjudication of their rights by a court having jurisdiction.

The District Court was justified in granting the motion to dismiss the complaint and for summary judgment on any one of these several grounds.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: July 11, 1949